4-5-1976

Charles Tyler and Erie C. Mitchell v. Commonwealth of Kentucky

Reply Brief 1975-SC-0946

REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE No. 75-946

CHARLES TYLER and
ERIE C. MITCHELL — APPELLANTS

vs.

COMMONWEALTH OF KENTUCKY — APPELLEE

Appeal from Mason Circuit Court
Honorable John Clarke, Jr., Judge

REPLY BRIEF FOR APPELLANTS

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Copies served on R. F. Stephens, Attorney General of the Commonwealth of Kentucky, State Capitol. Frankfurt, Woodson T. Wood, Commonwealth Attorney, Mason County Courthouse, Maysville, and Judge John Clark, Jr., Mason Circuit Court, Maysville, pursuant to R.C.A. 1.250.

John L. Ward
Counsel for Appellants

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ARGUMENT

I. THE ERROR OF THE COURT BELOW IN DELIVERING TO THE JURY THE WRITTEN JURY INSTRUCTIONS TOGETHER WITH SUPPLEMENTAL VERBAL INSTRUCTIONS DURING THE INVOLUNTARY ABSENCE OF THE APPELLANTS HAS BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

As indicated by the Appellee in its brief, the error of the court below in delivering instructions to the jury during the involuntary absence of the Appellants was properly preserved for review by Appellants' Motion for a New Trial (Tr. of Record at 42-43). See Hartsock v. Commonwealth, Ky., 382 S.W.2d 861, 864 (1964).

Moreover, the absence of a stenographic transcript of this proceeding is no bar to appellate review of the error. In Byerly v. Commonwealth, 297 Ky. 782, 181 S.W.2d 429 (1944), the defendant sought reversal of a criminal conviction on the ground that the trial judge had, during the defendant's absence, entered the jury room to confer with and advise the jury. The record did not disclose what took place on that occasion, but the court nonetheless held such action on the part of the trial judge constituted reversible error. Citing the cases of Bentler v. Commonwealth, 143 Ky. 503, 136 S.W.2d 896 (1911), and Puckett v. Commonwealth, 200 Ky. 509, 255 S.W. 125 (1923), as involving similar questions, the court stated that:

> The Commonwealth contends those cases are distinguishable because the record in the present case does not show what actually transpired in the jury room while Judge Hindman was present. We think the judgment in the case at bar should be reversed. The opinion in the Puckett case sets forth that in the case of errors of a similar

> nature this Court should not stop to weigh probabilities or try to discover from the record whether they were or were not prejudicial, but should assume they amounted to such an invasion of the constitutional rights of the accused as to deprive him of a fair and impartial trial. . . . True it is the record does not show what transpired while Judge Hindman was in the jury room, but, according to the bill of exceptions, he did enter therein, and it is not to be presumed that his entry was without purpose. . . .

181 S.W.2d at 430-31

In Goodman v. Commonwealth, Ky., 423 S.W.2d 905 (1968), the court interpreted Puckett and Byerly as standing for the proposition that "prejudice will be assumed in the absence of a showing that there could not have been any prejudice." Id. at 906 (emphasis in the original). Furthermore, the court "will not stop to weigh probabilities or try to discover whether there was in fact a prejudicial effect." Id. at 906-07. Since it was not shown that prejudice could not have resulted, the court held the error was prejudicial, so as to require a reversal of the judgment.

It is, therefore, respectfully submitted that the lack of a stenographic transcript is no bar to appellate review of this error committed by the court below.

> II. THE COURT BELOW ERRED IN DENYING THE CHALLENGE OF THE APPELLANTS TO THE ENTIRE ARRAY OF THE JURY ON THE GROUNDS THAT THEY WERE PREJUDICED AS A MATTER OF LAW.

In the Court's Order Overruling Motion and Grounds for New Trial, the Court stated:

> The Court examined the jury panel at the beginning of the trial and excused each

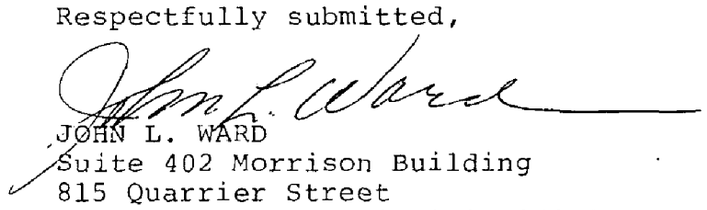
> member of the panel who had served as a juror in the trial of the defendants on a different charge.

Tr. of Record at 46, paragraph 1. At this time, all members of the jury panel were made aware, if they had not already known, that Appellants had already been tried on another criminal charge.

Appellee argues in its brief that Appellants' argument that the overruling of Appellants' challenge to the panel was error by the court below would "make it virtually impossible to try these defendants or any other defendant at any term of a circuit court on two or more criminal offenses when the offenses are to be tried separately." (Brief for Appellee at p. 7). Such argument ignores the fact that the proper procedure would have been to ascertain which members of the panel had served as jurors in the previous trial and to excuse them prior to the voir dire examination of the remainder of the panel. By questioning and excusing those former jurors in the hearing of the remainder of the panel, the court below succeeded only in acquainting the entire panel with the prior proceeding, if indeed they were not already aware of it. See, e.g., State v. Lewis, 141 S.C. 207, 139 S.E. 386 (1927), where reversible error was found in permitting jurors to be called who had served on a jury which had just convicted the same defendant of another crime. This was done over the objection of the defendant's counsel, and necessitated examining the jurors on their voir dire in open court in the presence of the other jurors. The court reasoned that the defendant did not get a fair trial, since the examination of the jurors was highly prejudicial and poisoned the whole air of the courtroom.

It is respectfully urged that the court below erred in allowing jurors to be called to serve who had just convicted Appellants on another criminal charge and in examining those jurors on voir dire as to their service in the previous trial. It is further submitted that it was reversible error to deny Appellants' challenge to the entire array, where there were reasonable grounds to believe such a jury could not render an impartial verdict as a matter of law.

Respectfully submitted,



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